IN THE LABOUR COURT OF LESOTHO

CASE NO LC 2/98

HELD AT MASERU

IN THE MATTER OF:

KOBESE HLATSI APPLICANT

AND

THE EMPLOYMENT BUREAU OF AFRICA LTD (TEBA)
RESPONDENT

JUDGMENT

The applicant was at all material time up to the 5th December, 1997 an employee of the respondent. Applicant avers in his statement of case that the respondent *"....unlawfully, wrongfully and unfairly dismissed applicant from his employ".* The present proceedings were launched on the 2nd January, 1998. A relief is sought in the following terms:

1. **The purported dismissal by the respondent be set aside;**
2. **The applicant be reinstated with payment of all his emoluments and benefits; and**
3. **costs of suit.**

<u>Alternatively:</u>

(a) The respondent be ordered to pay such damages and terminal benefits as the Honourable Court may deem fit;
(b) Costs of suit.

The grounds on which relief is sought are contained in the Further Particulars and Further and Better Particulars which were filed on the 17th February, 1998 and 19th April, 1999 respectively. These are that;

(i) The person who purported to dismiss applicant had no authority to do so;
(ii) The presiding officer at the hearing was the judge in his own cause in that he was investigator of the same case;
(iii) The charges against the applicant had prescribed;
(iv) Applicant's appeal to the General Manager was heard by the Manager - Financial Operations;
(v) The charges were not proved on the evidence in as much as there was no admissible evidence of the alleged commission of the offences charged.

In terms of the minutes of pre-trial conference, held on the 1st April, 1999 counsel reached an agreement that Mr Gregory who dismissed the applicant, had an authority to do so by virtue of a Power of Attorney dated 4th January, 1993. It follows that the first ground on which relief was sought falls away. After several postponements this matter was finally heard on the 9th September, 1999. At the hearing counsel agreed to argue only the legal points which are capable of being decided without extrinsic evidence and only proceed to the merits in the event of the legal point(s) not succeeding.

Mr Phafane for the applicant persued two legal points, namely that; the charges against the applicant had prescribed and that the presiding officer was a judge in his own cause. Regarding the first point he referred the Court to TEBA's Disciplinary Code in particular Clause 5 thereof which reads:

> ***"5. TIME LIMITS FOR TAKING DISCIPLINARY ACTION***
>
> ***In order to ensure that disciplinary action is taken as soon as possible, the following time limits shall apply. Disciplinary action will be taken within seven working days of it being discovered by a manager or supervisor that a breach of the Disciplinary Code has been committed. This time limit excludes weekends, public holidays and scheduled days off. If further investigations into the case is needed which will exceed the specified time limit then the manager will inform the employee of the reason for the delay."***

Mr Phafane for the applicant contended that the applicant's alleged breach of the Code on the 29th August, 1997 came to the knowledge of the respondent on the 1st September, 1997. To prove this he handed in without, objection from respondent's counsel, exhibits "KH1", "KH2" and "KH3" which are statements made by the applicant and two eye witnesses. These statements were handed in not as proof of their contents but as proof that they were made. He argued that the

acknowledgment of receipt of the statements as evidenced by the respondent's date stamp on each of the exhibits shows that they were received by the respondent on the 1st September, 1997.

Concerning the second count of threatening assault, Mr Phafane contended that, the respondent became aware of the alleged misconduct on the 2nd September, 1997. This misconduct had allegedly been committed on or around the second week of August the same year. He handed in exhibits "KH5"and "KH6" both of which are statements made by the alleged victim of the threat of assault. Again these exhibits were handed in without objection and they were handed in only as proof that they were made. "KH5" was taken from the complainant by one of the senior officers of the respondent Mr Senatla and it is dated 2nd September, 1997. "KH6" was taken from the complainant by even more senior officer of the respondent, Mr Gregory and it is dated 02/09/1997 at 1105 hours. Both these officers have signed as proof that they are the ones who took the statements on the dates mentioned.

Mr Phafane also handed in exhibit "KH4" which is a charge sheet calling applicant to appear before a disciplinary enquiry on the 30th September, 1997. The charge sheet itself is dated 23rd September, 1997. It was Mr Phafane's submission that when the charges were preferred against the applicant on the 23rd September, 1997, those charges had prescribed as the seven days time limit had long lapsed. He contended further that the condition precedent namely; that if there is need for longer time than seven days to be taken before the disciplinary hearing can be convened, the manager must inform the employee of the reason for the delay had not been met by the respondent. He submitted that on this point alone the dismissal of the applicant must be set aside.

Regarding the second legal point, Mr Phafane referred the Court to exhibit "KH6" and invited the Court to note that that statement was taken from the complainant by Mr Gregory on the 2nd September, 1997 at 1105 hours. He averred, and it was not denied, that it is common cause between the parties that Mr Gregory was the chairman of the disciplinary hearing into applicant's alleged misconduct. He submitted that Mr Gregory could not pass the test of impartiality, having presided over a case which he had investigated himself.

Ms Sephomolo for the respondent argued that the disciplinary Code acknowledged situations where it would take longer than the seven days to institute a disciplinary hearing. She contended further that in between the 1st and 2nd September, 1997 on the one hand and 23rd September, on the other hand, the respondent was still conducting investigations. She handed up exhibits "TEBA1" and "TEBA2" which are statements by the victim of the assault in count one and a potential witness to the alleged assault respectively. "TEBA1" is evidenced by respondent's date stamp as received on the 9th September, 1997 while "TEBA2" is dated by its author on the 23rd September, 1997.

Again no objection was raised to the handing in of these exhibits and they were handed not as proof of their contents, but only that they were made. Mr Phafane's response, with which we are in full agreement was that the disciplinary code says the disciplinary action must be taken within seven days of the discovery of the alleged misconduct, not seven days of the completion of the investigations. That the statements were still being collected even as late as 23rd September, shows that the investigations were not complete, not that it was only then the alleged misconducts were discovered. It terms of the code, incomplete investigation is a ground for the time limit to be exceeded, but as Mr Phafane correctly argued, the accused employee must be informed of the reason for the delay. There is no evidence that the applicant herein was informed of the reasons for the delay.

Ms Sephomolo referred this Court to the case of Korsten .V. Macsteel (Pty) Ltd & Another, (1996) 8 BLLR 1015 as authority for the proposition that the test is whether the employer/employee relationship has been so prejudiced by the employee's behaviour, that the employer is entitled to dismiss the employee. To this end she submitted that the court should take into account the gravity of the offence committed by the applicant. Two things need to be noted about this argument. Firstly, it goes into the merits of the case which must be proved by oral evidence. There is no evidence before Court to determine applicant's culpability or the gravity of the offence he allegedly committed.

Secondly, it fails to distinguish the Korsten case from the instant matter in that in the former the argument and finding of the Court was on the substantive fairness of the dismissal. In the instant matter, the applicant's contention is that the substantive fairness of his dismissal ought not to have been in issue in the first place because the employer failed to take action within the time stipulated by the rules. In our view therefore, this argument is misplaced and as such it must fail.

In matters of this nature this Court has often referred to the judgment of Landman P. & De Kock S.M. in National Education, Health & Allied Workers Union & Others .V. Director General of Agriculture & Another (1993) 14 ILJ 1488 at p. 1500 C and G-H where the learned President and learned Senior Member stated that:

> ***"It has become the practice of the Court in dealing with the private sector to hold an employer to his unilateral or negotiated code including a retrenchment code. There is merit in this. An employer should live up to the expectations created amongst his staff by his unilateral Code." (*At paragraph C).**

At paragraph G-H the learned President and Senior Member conclude that:

> ***"This court will give effect to the agreed or self-imposed values of the parties".***

The respondent herein has imposed an obligation on itself to act swiftly in the event of an employee being found to have breached the disciplinary code. This is not without merit, for an employee who is to face disciplinary action must know his or her fate within a reasonable time. This is also in line with ILO Recommendation 166 of 1982 article 10 of which, suggests that:

> ***"The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable time after he has knowledge of the misconduct."***

In hoc casu the employer has imposed a seven day time limit on itself . It further has said the worker will be informed of the reason for delay if investigations warrant that there be a delay. We interpret the word "will" in Clause 5 of the code as mandatory because the manager is not given a discretion whether to inform the worker of the delay or not. The Manager was obliged to have informed the applicant of the delay. Failure to follow the Code in this regard was in our view a serious irregularity on the part of the respondent. There is not the slightest doubt in our minds that the proceedings were badly tainted to an extent of nullification by this irregularity. We find ourselves in full agreement with submission by applicant's counsel that the charges against the applicant had prescribed at the time that they were preferred against him.

Regarding the alleged procedural unfairness resulting from Mr Gregory having chaired the case in which he was an investigator, Ms Sephomolo argued that the applicant should have raised the objection at the enquiry itself. She referred us to Construction and Allied Workers Union .V. SABRICKS (1996) 1 BLLR 51. In that case Jacobs AM had this to say at p.55 of the judgment:

> ***"In my view, the fact that a chairman does not have an open mind, or is biased or does not listen (politely or otherwise) to the employee can only support a claim that the proceedings are a sham if the employee participates in the enquiry. Clearly, if an "accused" does not attend the enquiry he may not complain that the chairman was biased (unless that is the reason for his failure to attend). Equally, if an "accused" does not say anything in his defence, he may not rely on the bias of the chairman. It is only when an accused participates fully in what he thinks is a fair hearing and that hearing turns out to be the opposite that there is room to contend that the proceedings were a sham."***

The ruling is infact based on an earlier industrial Court decision in the case of Rekitt & Colman (SA) (Pty) Ltd .V. Chemical Workers Industrial Union & Another (1991) 12 ILJ 806 where the court made the following dicta at p. 813:

> ***"it would appear that under normal circumstances an employee who is to be disciplined has to attend and partake in those proceedings. If he refuses to do***

> ***so, he could hardly allege that the proceedings and the outcome of the proceedings were unfair or amounted to unfair labour practice. There may obviously be occasions when employees with reason could refuse to attend such proceedings."***

The present case is distinquishable from the SABRICKS case. The accused employees in the SABRICKS case had not participated in the enquiry. They were only represented by the shop stewards. It is those people who deny themselves the opportunity to defend themselves against the allegations that the Court says they may not later seek to challenge the procedureal or even substantive fairness of the employer's disciplinary action against them. There is no evidence that the applicant in the instant case did not participate in the disciplinary proceedings. Accordingly, he is not barred from challenging the fairness of the disciplinary proceedings as well as the outcome before this court.

It was further contended on behalf of the respondent that Mr Gregory took the statements because there was no one else to do so and that in any event at the hearing the statement that was used was the one taken by Mr Senatla. These are not only hearsay, they are also factual issues which cannot be tendered from the bar as was the case. Of significance is the fact that it is not denied that Mr Gregory was at one stage an investigator of the same case that he became the presiding officer of. According to the general Power of Attorney given to Mr Gregory by TEBA General Manager, Mr Gregory's position is or was TEBA manager- Lesotho (see Power of Attorney attached to the minutes of the pre-trial conference filed of record on the 19th April, 1999). Mr Gregory is therefore, the right person to have conducted the disciplinary enquiry as he is specifically so authorised by the respondent's code. (See Supreme Furnishers (Pty) Ltd & Another .V. Letlafuoa Hlasoa Molapo 1995 - 1996 LLR - LB 377 at 385 -386). The issue which we must decide is whether Mr Gregory's previous involvement as an investigator is permitted by the code and whether such involvement in any way tainted the fairness of the disciplinary hearing into applicant's alleged misconduct.

Clause 7 of the respondent's code provides:

> ***"7. PROCEDURES FOR DISCIPLINARY ACTION***
>
> ***As soon as the manager has been made aware that an employee has committed an alleged offence, he must within seven working days take the following action;***
>
> ***(i) cause an enquiry to be held to determine whether an offence has been committed;***
> ***(ii) commence a disciplinary hearing."***

The enquiry to determine whether the offence has been committed is infact the process of investigation. The code says the manager shall "cause" the enquiry to be

held. The contextual meaning of "cause" in this instant would according to the Concise Oxford Dictionary be to "induce". In other words the manager's role would be to use his high office to facilitate investigations not that he does it himself. We are accordingly of the view that his direct involvement in the investigations is not authorised by the code. But the question is, did he commit an irregularity by investigating the case which he later chaired?

Ms Sephomolo contended however, that the respondent's disciplinary proceedings are internal, domestic proceedings into which the stringent criminal justice procedures must not be imported. Indeed this Court has previously associated itself with Baxter's remarks in his Administrative Law 1984 Ed. at p. 543 and p. 545 respectively where he says;

> ***"The courts have refused to impose upon the administration the duty to hold trial-type hearings where these are not prescribed by statute."***

And further;

> ***"Except where legislation prescribes otherwise administrative bodies are at liberty to adopt whatever procedure is deemed appropriate provided this does not defeat the purpose of the empowering legislation and provided that is fair."***

In the case of National Union of Printing, Publishing and Allied Workers .V. Lesotho Evangelical Church & Another - LC 35/95 (unreported), this Court found that the dismissals of members of the applicant union were procedurally unfair because the person who chaired the disciplinary proceedings had himself been the investigator. At p. 596 - 597 of his work Baxter supra submits that:

> ***"What fairness demands in any particular situation may, however vary. Its content will depend upon how best to achieve the objectives and values underlying the duty to act fairly. In situations such as serious disciplinary cases fairness may demand strict adjudicative procedures and stringent evidential requirements."***

There is no doubt that a disciplinary enquiry in which an employee is faced with possible dismissal in the event of a conviction is a serious case, it being considered that dismissal in employment relationship is an equivalent of a death penalty. We are in full agreement that given the seriousness of applicant's disciplinary case the respondent should have exercised more caution in exercising its freedom to choose the procedure to follow in hearing the case.

Mr Gregory's previous contact with the witnesses, could possibly lead him to prejudge the issues involved. As it has been said the test is not so much the factual

existence of bias. Baxter supra at p. 564 captures it in more appropriate words when he says:

> ***"real or apparent prejudgment of the issues to be decided by the decision-maker gives rise to disqualification on grounds of bias. Prejudice usually arises as a result of the decision-maker's past activities, past relationship with the affected individual ..." (such as Mr Gregory's past role as a person who was gathering information to secure applicant's conviction).***

In his article the "The Right to a Hearing Before Dismissal" - part 1 (1986) 7 ILJ 183 at p. 213, Judge Cameron, while admitting that;

> ***"bias will always be difficult to prove (submits that) the (courts) are none the less strict in seeking to enforce a requirement that a person presiding over a disciplinary hearing should keep an open mind."***

The learned judge goes further to suggest that;

> ***"The principle seems to be this: while allowance will be made for the unavoidable practicalities of prior contact, personal impression and mutual reaction in the employment relationship, any further feature bringing an objective and fair judgment to bear on the issues involved - such as bias or presumed bias stemming from closed or prejudiced mind or from a family or other relationship will render the procedure unfair."***

We are not persuaded that the procedure followed in this case was fair. To use Lord Chief Justice Hewart's much celebrated precedent "*it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (*Per Lord Herwart CJ in R/V. Sussex Justices, ex parte McCarthy (1924) 1 KB 256 at 259). Surely the impression that has been created in the mind of any reasonable person, by the procedure adopted is to seriously question if justice has been done given the double role played by Mr Gregory. In the premises even this point of law ought to succeed and it is accordingly upheld.

It seems to this Court that these two legal points go beyond simple procedural formalities. The impropriety arising out of failure to comply with these procedures go to the very heart of this case. If the charges that were preferred are found to have prescribed in terms of the code as we have found it follows that as at the time when the enquiry purported to hear applicant's case there was actually no case against the applicant. Similarly the presiding officer's playing of the role of investigator of the same case is a serious irregularity which taints the entire proceedings beyond redemption. Accordingly the finding of this Court is in essence that even substantively there is no fairness in applicant's dismissal.

It follows therefore, that the applicant is entitled to the same relief to which an employee whose dismissal is substantively unfair would be entitled. The same approach was adopted by Roth SM in NUMSA .V. Lasher Tools (Pty) Ltd (1994) 15 ILJ at 169 where he found:

> ***"that the unfairness of the implementation of the disciplinary procedure was such that it should be treated on the same basis as fundamental substantive unfairness."***

In the ordinary course of things the Court would, having set aside applicant's dismissal on the ground of substantive unfairness, as it hereby does, order reinstatement of the applicant. However, the court is vested with a discretion whether to order reinstatement or award payment of compensation. It is trite law that such discretion must be exercised judicially. The court is also enjoined, in the event of ordering compensation to take into account whether the applicant has taken reasonable steps to mitigate his loss. Accordingly, there is need for counsel to address the court on the relief to be granted as well as the steps taken to mitigate the loss, so that the court can exercise the discretion whether to reinstate or not to reinstate judicially. Counsel shall therefore find a date within seven days of the delivery of this judgment on which they will address the Court on the issue of the appropriate relief.

This being the case of unfair dismissal there is no order as to costs.

THUS DONE AT MASERU THIS 16H DAY OF SEPTEMBER, 1999.

L.A LETHOBANE
PRESIDENT

M. KANE
MEMBER **I CONCUR**

A.T KOLOBE

MEMBER **I CONCUR**

FOR APPLICANT : **MR PHAFANE**

FOR RESPONDENT: **MS SEPHOMOLO**